

K-Mart and its workers' compensation insurance carrier, Specialty Risk Services (referred to jointly as "K-Mart" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Hann's award of permanent total disability compensation and medical benefits to C. D. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mrs. D. was working for K-Mart on July 15, 2000, when she fell as a result of an altercation with a shoplifter. Mrs. D. now seeks permanent total disability compensation and medical treatment for back and leg problems she claims were caused by the K-Mart incident.

Mrs. D. filed her application for hearing with the Commission on November 2, 2001. Judge Hann held an evidentiary hearing on April 21, 2003, and then appointed a medical panel to consider Mrs. D.'s claim. The panel submitted its report on January 9, 2004. In a decision dated July 21, 2004, Judge Hann accepted the panel's findings and concluded Mrs. D. was entitled to permanent total disability and medical expenses. Judge Hann also directed K-Mart to begin paying subsistence benefits to Mrs. D. and to elect whether to submit a rehabilitation/reemployment plan for Mrs. D..

On July 30, 2004, K-Mart informed Judge Hann it would not submit a rehabilitation/reemployment plan. Consequently, on August 23, 2004, Judge Hann entered final judgment in favor of Mrs. D.. K-Mart then filed a timely motion for review contending that Mrs. D.'s circumstances do not satisfy the criteria established by §34A-2-413 of the Utah Workers' Compensation Act for permanent total disability compensation.

FINDINGS OF FACT

The Appeals Board finds the following facts to be material to Mrs. D.'s claim for benefits. The Appeals Board also adopts Judge Hann's findings of fact to the extent such findings are consistent with these findings.

Mrs. D. was born on June 21, 1931. She attended school into the 10th grade. She has no other formal education or training. She worked at K-Mart from 1960 until 1965, then went to work for a local hospital. She left this hospital in 1992 after undergoing knee replacement surgery and being awarded social security disability benefits.

Mrs. D. turned 65 in 1996. At that age, her social security disability payments stopped and she began receiving social security retirement benefits. In 1998 she accepted part-time work at K-Mart as a "greeter" This involved standing near the store's entrance and exit doors where she could greet customers, answer their questions and monitor the theft-detection buzzers at the doors. If a buzzer sounded, Mrs. D. was required to walk rapidly approximately 15 to 20 feet to that door,

examine the customer's merchandise and receipt, and then either retrieve merchandise that had not been paid for or deactivate merchandise that had been paid for. The job required Mrs. D. to be on her feet most of the time. Prior to her work injury, Mrs. D. loved her job and considered it "easy to do." She had only minor back aches and never missed any work on account of back problems. Her supervisors considered her honest, hardworking and a "great employee."

While working on July 15, 2000, Mrs. D. went to the assistance of a security guard who had detained a suspected shoplifter outside the store. The guard was holding one of the suspect's arms, but the suspect pushed Mrs. D. in the face with her other arm. Mrs. D. fell down, hitting her head and back on the concrete sidewalk. A co-worker helped Mrs. D. to her feet. She returned to the store, completed an incident report and then returned to her work station. About an hour later, she began experiencing numbness in her legs and difficult walking. She was taken to a local emergency room where she complained of low back and right hip pain. X-rays showed degenerative changes in her spine but no fractures. She was told to take the next few days off work.

Mrs. D. returned to regular duties at K-Mart on July 20, 2000. After Christmas, she was transferred to the sales floor where she used a shopping cart to transport merchandise that had been returned back to the sales racks. Later, she returned to her position as a greeter. Throughout this period of time, Mrs. D.'s work was acceptable to K-Mart, but she continued to experience pain in her back and right buttock. She stopped working on May 2, 2001, because of this pain.

Mrs. D. later attempted an experimental return to work that lasted six weeks. K-Mart was satisfied with her performance, but Mrs. D. stopped working on advice of her healthcare provider, who had visited the store and observed that there was no table and chair for Mrs. D. at her work station and that she was moving too rapidly from door to door. The health care provider concluded these factors exceeded Mrs. D.'s capabilities. In Mrs. D.'s own opinion, she could not have continued at K-Mart because the work caused too much pain.

Prior to the work accident at K-Mart, Mrs. D. had numerous medical problems, including diabetes, hypertension, heart surgery, right knee replacement, osteoporosis, degenerative spine disease, and several incidents of injury or complaint of pain related to her back and knee.

The medical aspects of Mrs. D.'s claim have been referred to an impartial panel of medical experts. The Appeals Board accepts the medical panel's findings and, on that basis, concludes Mrs. D.'s work injury caused permanent aggravation of her preexisting degenerative spinal condition, resulting in a 5% whole person impairment. Since the accident, Mrs. D. has had consistent symptoms of back and right leg pain. Mrs. D. may require a home exercise program to achieve a "level of fitness" as well as occasional use of anti-inflammatory medication to treat her work-related injury.

Now, Mrs. D. has frequent significant pain with some episodes of extreme pain. She has difficulty getting out of a chair, going up stairs, or bending over. She is most comfortable when lying down, which she does several times each day. She is restricted from: 1) lifting more than 15 pounds; 2) frequent bending; 3) sitting, standing or walking more than 15 minutes at a time. Additionally, she must be allowed to rest as needed. She can drive a car, but only for short distances of a mile or two. She is able to do some light housekeeping and cooking.

DISCUSSION AND CONCLUSIONS OF LAW

There is no dispute that, as a result of the events at K-Mart on July 15, 2000, Mrs. D. suffered injuries that are compensable under the workers' compensation system. The question before the Appeals Board is whether Mrs. D. has established her right to the specific workers' compensation benefit of permanent total disability compensation. In order to qualify for permanent total disability compensation, Mrs. D. must satisfy the provisions of §413(1)(b) of the Act, which require that she prove: 1) she is significantly impaired from her work accident; 2) she is permanently and totally disabled, as judged by the four standards set forth in subsection 413(1)(c); and 3) her work accident directly caused her permanent total disability. These requirements are discussed below.

1) Significant impairment from work accident. Subsection 413(1)(b)(i) requires that Mrs. D. prove she sustained a significant impairment "as a result of" her work accident. In judging whether Mrs. D. has satisfied this requirement, the Appeals Board does not consider any of Mrs. D.'s impairments that were not caused by her work accident.

The Appeals Board has adopted the medical panel's opinion that Mrs. D.'s work accident caused "medically-documented injury and subjective symptoms persisting for a minimum of six months with a clinical history of a significant injury event" resulting in a permanent 5% impairment. The Appeals Board concludes that this is a significant impairment within the meaning of §413(1)(b)(i).

2) Permanent total disability. Subsection 413(1)(b)(ii) requires that Mrs. D. prove she is permanently totally disabled by establishing the existence of **each** of four factors set out in subsection 413(1)(c), summarized and discussed below.

a) The employee is not gainfully employed. Mrs. D. satisfies this requirement in that she is not gainfully employed.

b) The employee's impairments limit basic work activities. This factor takes into account all Mrs. D.'s impairments, regardless of cause. Furthermore, this factor only requires that the impairments "limit" the ability to do basic work activities. The Appeals Board views the term "basic work activities" as referring to common activities shared in a wide variety of occupational settings and not to unique requirements of particular jobs. In this sense, the term includes attendance, flexibility, strength, comprehension, ability to communicate, and other similar abilities.

Mrs. D.'s impairments from her various work and non-work impairments limit her mobility, her ability to sit or stand at a work station, her ability to remain at work and her ability to lift and bend. The Appeals Board therefore concludes that Mrs. D.'s impairments limit basic work activities.

c) The work-related impairments prevent the employee from performing the essential functions of past work. Here, the focus is limited to work-related impairments and the effect those impairments have on the injured worker's ability to perform the essential functions of his or her

previous work. Mrs. D.'s work-related impairments consist of increased pain in her back and buttock resulting from the aggravation or "lighting up" of her pre-existing degenerative spinal condition. As a result of these work-related impairments, she cannot stand, sit or walk for more than 15 minutes at a time, nor can she lift more than 10 pounds.

In identifying the essential functions of Mrs. D.'s prior work, the Appeals Board notes she worked at both K-Mart and Cottonwood Hospital many years ago. However, the duties of those jobs have not been described and are too distant in time to be relevant to her current condition. This leaves Mrs. D.'s employment at K-Mart between 1998 and 2000 as her only relevant prior work.

The Appeals Board concludes that during this two-year period of employment, Mrs. D.'s primary work assignment was as a "greeter." The essential functions of this position are to make contact with customers entering the store and to monitor the theft-detection buzzers at the doors. Obviously, the job requires the employee's presence at his or her duty station close to the doors. The job requires a substantial amount of walking back and forth between entrance and exit doors.

The Appeals Board notes K-Mart's argument that this job could have been modified to accommodate Mrs. D.'s limitations. However, subsection 413(2)(c)(iii) requires an evaluation of the essential functions of the position **before** the time of the work accident. The question of an employer's willingness and ability to modify a position in order to accommodate an injured worker is taken into consideration under subsection 413(6), dealing with rehabilitation and reemployment.

The Appeals Board therefore concludes that the preponderance of evidence establishes that Mrs. D.'s work-related impairments have left her unable to meet either the attendance or walking requirements of her former job as a greeter. Mrs. D. therefore satisfies this part of the test of permanent total disability.

d) Ability to perform other work reasonably available, considering the employee's age, education, past work experience, medical capacity, and residual functional capacity. This part of subsection 413(2)(c) requires the Appeals Board to consider whether Mrs. D. could do other work that is reasonably available, taking into account the sum total of her abilities, disabilities, strengths and weaknesses.

Mrs. D.'s strengths are a strong work ethic, dependability and a good rapport with customers. On the other hand, she is an older worker with limited education and a myriad of health problems. As has already been discussed, she has significant limitations to her ability to move, bend, walk and remain at her work station. On balance, the Appeals Board concludes that she cannot perform the other kinds of work that would reasonably be available to her.

The Appeals Board notes K-Mart's suggestion that it has other positions that could accommodate Mrs. D.'s limitations. While these positions would provide an appropriate wage to Mrs. D. and are also in an appropriate location, it is apparent that the positions described by K-Mart do not exist as such, but would have to be designed with the specific purpose of meeting Mrs. D.'s physical limitations and needs. In that light, these positions do not constitute "other work reasonably available" within the meaning of subsection 413(1)(c)(iv).¹

In summary, the Appeals Board concludes that Mrs. D.'s circumstances satisfies each of the four factors set out in subsection 413(1)(c) as necessary to a finding of permanent total disability.

3. Work accident as direct cause of disability. The final element Mrs. D. must prove in order to establish her claim is that her work accident of July 15, 2000, is the direct cause of her permanent total disability. The evidence on this issue is decidedly mixed. On one hand, after the accident Mrs. D. was able to return to work for the next ten months. On the other hand, Mrs. D. was having no difficulty performing her duties at K-Mart until the work accident. Thereafter, she suffered chronic back and leg pain that ultimately caused her to quit her job at K-Mart. It is clear that she did not want to stop working, but was forced to that decision by pain and lack of mobility attributable to the work-related injury. The Appeals Board therefore concludes that Mrs. D.'s work-related injury is the direct cause of her permanent total disability.

Conclusion. The Appeals Board concludes that Mrs. D. has satisfied the criteria for permanent total disability set forth in subsections 413(1)(b) and (c). Ordinarily, under subsection 413(6), any such determination of permanent total disability is tentative until the employer has an opportunity to either 1) submit a reemployment plan or 2) notify the administrative law judge that it will not submit a reemployment plan. In this case, K-Mart has declined to submit a reemployment plan. Consequently, the Appeals Board concludes that Mrs. D. is entitled to a final award of permanent total disability benefits and medical benefits for treatment of her work-related injuries.

ORDER

The Appeals Board affirms Judge Hann's decision and denies K-Mart's motion for review. It is so ordered.

Dated this 29th day of April, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. These modified positions might be appropriate as part of a reemployment plan under subsection 413(6)(a)(ii), but K-Mart has stated that it will not submit a reemployment plan.